No. 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

DORSEY K. OFFUTT, An Attorney, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF FOR PETITIONER ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

TABLE OF CASES

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

MISCELLANEOUS.

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Petitioner, Dorsey K. Offutt, is an attorney at law and seeks the reversal of the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit, entered November 19, 1953, modifying a summary contempt judgment entered by Judge Alexander Holtzoff of the United States District Court for the District of Columbia against petitioner and reducing the sentence of imprisonment from ten days to forty-eight hours.

THE OPINIONS BELOW

The United States District Court for the District of Columbia summarily adjudged petitioner in contempt of court and sentenced him to ten days' imprisonment.

The Certificate of the District Court adjudging petitioner in contempt was entered June 16, 1952 (R. 25-29). The opinion of the United States Court of Appeals for the District of Columbia Circuit, modifying the District Court's adjudication of contempt and reducing petitioner's jail sentence from ten days to forty-eight hours, is reported at 208 F. 2d 842 and appears at R. 264-267. The opinion of the Court of Appeals in the case of *Henry L. Peckham, Jr.* v. *United States of America*, No. 11,487, decided the same day, which is referred to and made a part of the *Offutt* opinion by reference, is reported at 210 F. 2d 693 and appears at R. 269-290.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on November 19, 1953. Petitioner timely filed a Petition for Rehearing (R. 291-302). The Court of Appeals entered an order denying this petition on December 14, 1953 but in that order deleted footnote 1 on page 3 of the original opinion and entered a new footnote 1, having reference to finding 11 of the District Court. The Court of Appeals stayed its mandate pending application to this Court for certiorari (R. 306). On January 13, 1954, this Court extended the time for filing the Petition for Writ of Certiorari to and including February 12, 1954. A petition for certiorari was timely filed on February 12, 1954 and granted by this Court (R. 308). The jurisdiction of this Honorable Court is invoked under the Act of June 5, 1928, 28 U. S. C. A., Sections 1254 and 2101, and Rule 37 of the Federal Rules of Criminal Procedure.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

Constitution of the United States:

Article III, Section 2(3)

> The trial of all crimes, except in cases of impeachment, shall be by jury; * * *

Fifth Amendment. No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, Section 401, U. S. C. A., Chapter 21:

Power of Court:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Rules of Criminal Procedure, Title 18, U. S. C. A.:

Rule 42. Criminal Contempt.

(a) Summary Disposition. — A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing.—A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice

shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilty, the court shall enter an order fixing the punishment.

QUESTIONS PRESENTED

The Court of Appeals modified a summary order of contempt of the District Court, sentencing petitioner to jail for ten days and reduced that sentence to forty-eight hours. In reducing the sentence that court held that this was necessary because the trial judge provoked petitioner, showed bias and prejudice and his treatment of petitioner barred the appellate court from sustaining the proceedings below as fair and impartial (R. 266, 281-282).

In reversing the *Peckham* case and in modifying the judgment in the *Offutt* case, the court below held (R. 281-282):

> A number of other questions are presented generally. These include claims of degrading and belittling remarks directed at defense counsel by the judge, restrictions upon cross-examination, the judge's assumption of the function of an advocate, lack of impartiality, and prejudicial remarks by the prosecutor. As to the effect of these matters on the fundamental fairness of the trial this court finds itself divided. Judge Edgerton and Judge Bazelon, constituting a majority of the court, are convinced that the excessive injection of the trial judge into the examination of witnesses,

his numerous comments to defense counsel, indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury; that, considering these matters and others, examples of which are set forth in an Appendix attached hereto, this court is barred from sustaining the judgment as the product of a fair and impartial trial. This necessitates reversal.

The writer of this opinion feels decidedly that it would have been preferable for the court to have restrained his interruption of the examining process. The Government was well represented and the extent of the judge's participation was not required by his obligation to maintain a firm and salutary control of the proceedings. We have today in No. 11466, *Offutt* v. *United States*, sustained the contempt conviction of defense counsel due to his conduct in this case but we have reduced the sentence. By sustaining the conviction we have expressed our conclusion that counsel was contemptuous, while in reducing the sentence we have reflected our view that his conduct was not altogether separable from that of the judge in treading the area reserved for counsel, thus creating conflict and engendering remarks and attitudes on the part of both court and counsel which afflicted the trial.

As we read the language of the court below in the light of the examples set forth in the appendix to the *Peckham* opinion (R. 285-290), that court held that petitioner was subjected to great provocation from the trial judge (R. 266), that "degrading and belittling remarks" were "directed to defense counsel" by the judge, that the judge assumed "the function of an advocate" and displayed "lack of impartiality" (R. 281-282). In reversing the *Peckham* case, the court below concluded that these actions of the trial judge and his excessive "injection * * * into the examination of witnesses (and) his numerous comments to defense counsel, indicating at times hostility * * * demonstrated a bias and lack of impartiality * * * " and rendered the trial unfair. The court below concluded that the "treatment of appellant" by the trial judge was the

"chief factor" which led the court below to conclude that neither the conviction of Dr. Peckham nor the sentence of petitioner could stand unmodified (R. 266-267). Against this background we say that the following questions are presented:

1. Whether the biased and prejudiced conduct of the trial judge and his treatment of petitioner precluded that judge from exercising against petitioner the summary power to hold petitioner in contempt of court, provided for in Rule 42(a) of the Federal Rules of Criminal Procedure.

2. Whether the findings of the Court of Appeals in affirming the judgment as modified, which show that the trial judge participated in the trial in such prejudicial fashion as to provoke petitioner to do the things which he did and upon which the modified judgment of contempt now rests, render the modified and summary judgment of contempt void because entered by a judge who was provocative and not impartial, as required by the rulings of this Court in *Cooke* v. *United States*, 267 U. S. 517, 69 L. Ed. 767, and *Tumey* v. *Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749.

3. Whether a trial judge who has been found by the Court of Appeals to have invaded the area reserved to counsel, who provoked counsel and who has shown hostility, prejudice and a lack of impartiality against petitioner was disqualified to exercise the summary power of contempt provided for in Rule 42(a) because of the decisions of this Court in *Cooke* v. *United States*, supra, and *Tumey* v. *Ohio*, supra.

4. Whether the exercise of summary power of contempt provided for in Rule 42(a), under the circumstances as now found by the Court of Appeals, was appropriate and proper. In this connection it can be assumed that the trial judge had summary power under Rule 42(a) but it should be remembered that the summary judgment of contempt

against petitioner came at the conclusion of the charge to the jury and notwithstanding that the trial judge had ample opportunity to afford petitioner a hearing within the usual conception of the due process of law as required by the Fifth Amendment to the Constitution without impeding or otherwise restricting the trial of the *Peckham* case.

5. Whether under all the circumstances of the case as now decided by the Court of Appeals in the *Offutt* and *Peckham* cases, which must be read together, petitioner was denied due process of law in violation of the Fifth Amendment because the trial judge proceeded summarily and denied petitioner the right to notice, charges, a hearing, including the right to offer evidence in contradiction or mitigation of such charges and to counsel.

6. Whether the exercise of summary power to adjudge an attorney, acting as defense counsel in a criminal case, in contempt exceeds the bounds of fair discretion as applied to those charges of contempt which the Court of Appeals has sustained, when the court below has found that the judge imposing that summary sentence was hostile, prejudiced, not impartial and guilty of provocation.

7. Whether this Court should exercise its power (described in *Sacher* v. *United States*, 343 U. S. 1, 9, 13) and protect defense counsel in a criminal case in the fearless, vigorous and effective performance of the duties pertaining to the office of advocate against an arbitrary exercise of summary contempt power under Rule 42(a), when the Court of Appeals sustained specifications dealing only with discourteous remarks, repeating questions, asking prejudicial questions of the prosecuting witness in an abortion case and the seeking of a mistrial, where there is no finding either by the trial judge or the Court of Appeals that this specified conduct impeded the trial or obstructed the progress of the trial. In this connection it must be borne in mind that the trial judge did not find, nor did the Court

of Appeals find, that there was a willful intent on the part of petitioner to violate court rulings in doing what he did to protect his client in the trial below, which trial has now been held by the Court of Appeals to be a mistrial mainly because of the conduct of the trial judge. In the absence of bad motives and specific intents, contempt charges in such circumstances summarily imposed upon trial counsel cannot be sustained. *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

8. Whether this Court should protect petitioner in accordance with *Sacher* v. *United States*, supra, 1, 9, 13, when the record shows that the District Court is conducting proceedings seeking to disbar petitioner from the practice of his profession, predicated in part on the summary findings entered by the trial judge, four of which have been affirmed on appeal, notwithstanding that the trial judge's conduct and the misconduct of the prosecutor were such as to require a modification of the sentence imposed upon petitioner and the reversal of the main action because such conduct was prejudicial and rendered the trial unfair.

STATEMENT OF THE CASE

This case presents for correction errors of the United States District Court for the District of Columbia, erroneously affirmed by the United States Court of Appeals for the District of Columbia Circuit. The case is one of importance. It involves important questions dealing with the rights of a defense counsel not to be deprived of his liberty without due process of law under the Fifth Amendment and of an accused to have effective "Assistance of Counsel" guaranteed him by the Sixth Amendment to the Federal Constitution.

Petitioner, Porsey K. Offutt, is a respected member of the Bar in good standing. On April 4, 1952, an indictment was returned in the United States District Court for the District of Columbia against Dr. Henry L. Peckham, a practicing physician (R. 2). The indictment charged Dr.

Peckham with committing two separate abortions at two different times involving the same complaining witness, a Mrs. Mary Lee Ott (R. 2). On May 23, 1952 petitioner entered his appearance for Dr. Peckham (R. 4). On the same day he appeared in the District Court and argued several preliminary motions. On May 26, 1952 petitioner argued a motion before Chief Judge Laws of the District Court which, among other things, sought a continuance to take the deposition of the mother of the complaining witness. This continuance was denied (R. 41-44). On May 27, 1952 the case was called for trial before Judge Alexander Holtzoff of the District Court and the trial commenced (R. 44). The trial lasted thirteen days. Twenty witnesses testified for the government and ten for the defense. Throughout the trial petitioner was sick, nervous and upset (R. 70, 72, 115). On numerous occasions during the trial, Judge Holtzoff addressed petitioner in a manner obviously upsetting and disconcerting, such as "stupid" (R. 55); "discourteous" (R. 139); "unethical" (R. 139); and with losing his mind (R. 226). Judge Holtzoff also accused petitioner of being "insolent" on many occasions in and out of the presence of the jury (R. 79, 127, 226). The judge threatened to have the marshal pull petitioner to his seat and have him gagged (R. 180, 213, 215) and jailed (R. 81-82). Whenever petitioner asked in what respect he was guilty of misconduct, the judge rebuked him and refused his request for information.

For the first three days of trial relations between the court and petitioner were without serious incident. On June 3, 1952 difficulties commenced, the judge rebuked counsel for his conduct but later expressed the view that petitioner did not intend anything contumacious by his conduct (R. 69). The situation was further strained because the prosecutor made unfair prejudicial statements regarding petitioner (R. 70, 88, 105, 127, 128, 137, 138, 179, 180, 218). On one occasion, in the presence of the jury, the prosecutor stated that petitioner had threatened to punch him in the nose (R. 45-46). In no instance did the judge

rebuke or admonish the prosecutor for his misconduct (R. 287-288). Yet the record is replete with numerous instances of colloquy between the judge and petitioner wherein the judge rebuked and chastized petitioner, even in the presence of the jury, and subjected petitioner to great provocation (R. 266-267, 287-290).

On June 16, 1952 the judge delivered his charge to the jury. Immediately thereafter, but before the jury returned its verdict, the judge summarily adjudged petitioner guilty of criminal contempt of court, within the meaning of Rule 42(a) of the Federal Rules of Criminal Procedure, for petitioner's conduct during the trial, sentenced him to ten days in jail and forthwith committed him (R. 22).

No hearing was afforded petitioner. He was denied any right of defense, any right of explanation and the right even to consult counsel (R. 257-258). Petitioner attempted to deny guilt and requested a stay for a short time to consult counsel. This was denied. Petitioner's associate counsel sought to be heard. His request likewise was denied (R. 259). Petitioner was forthwith taken into custody by the marshal and removed from the courtroom, notwithstanding that the verdict of the jury had not yet been returned. After the petitioner had been committed, a copy of the specifications of contempt and the order thereon were delivered by the judge to associate counsel for Dr. Peckham (R. 256-258). The specifications of contempt consisted of twelve main findings alleging different contempts (R. 25-29). By actual count, excluding the general contempt citation, the specific instances of alleged contemptuous conduct upon which the judge relied were sixty-eight in number (R. 25-29). On the same day petitioner filed a written motion for bail, which was summarily denied by the judge without argument (R. 32-33). Petitioner perfected his appeal to the United States Court of Appeals for the District of Columbia Circuit on the day of his commitment (R. 22-24). An immediate appeal was necessary because of the arbitrary denial of bail. This meant that petitioner's sentence would be carried out and he would have been deprived of any appeal contrary to

St. Pierre v. *United States*, 319 U. S. 41, 63 S. Ct. 910, 87 L. Ed. 1198, and *Sacher* v. *United States*, 343 U. S. 1, 72 S. Ct. 451.

On the evening of June 16, 1952, the day petitioner was committed, the Court of Appeals granted bail on appeal. Petitioner is at liberty on bail (R. 46-41).

Because of the importance of the questions involved, the Court of Appeals granted the parties permission to file briefs in excess of fifty pages and granted additional time for argument. On November 19, 1953 the Court of Appeals reversed findings 3, 4, 5, 7, 8, 9, 10 and 11 and affirmed findings 1, 2, 6 and 12 (R. 266-267). Because of this modification of the contempt findings the Court of Appeals concluded that the record did not support the penalty imposed and on the authority of *United States* v. *United Mine Workers of America*, 330 U. S. 258, 304, and *Rosenfeld* v. *United States*, 167 F. 2d 222, 223 (4 Cir.), unanimously concluded that petitioner's sentence should be reduced from ten days to forty-eight hours. Findings 1, 2, 6 and 12 of the trial judge, which the Court of Appeals erroneously affirmed, may be summarized as findings that petitioner was (1) discourteous to the court, (2) repeated questions, some of which were intended to besmirch a witness, (6) asked prejudicial questions of the prosecuting witness without foundation and (12) tried to create an episode which might lead to a mistrial (R. 26, 27, 28). The Court of Appeals affirmed the summary judgment of contempt based on these remaining four findings, notwithstanding that petitioner's "conduct cannot fairly be considered apart from that of the trial judge" (R. 266). The reasoning of the court below was that petitioner suffered "great provocation" from the trial judge (R. 266). Accordingly, that court concluded (R. 266-267):

> The judge's treatment of appellant, examples of which are included in an appendix to our opinion in *Peckham* v. *United States*, decided today, and which is the chief factor in leading a majority of this court to conclude that Peckham's conviction cannot stand,

> leads us all to conclude that appellant's sentence should be reduced from 10 days to 48 hours.

Notwithstanding that the Court of Appeals was of the opinion that the judge's treatment of appellant was the "chief factor" in causing the court to reverse the *Peckham* case and to reduce petitioner's sentence, the court below permitted four findings of contempt to stand, even though those findings were made by a judge who subjected petitioner to "great provocation" (R. 266) and who was affirmatively found by the Court of Appeals to have showed a lack of impartiality, hostility and bias against both petitioner and his client. The Court of Appeals also found that the prosecutor below was guilty of prejudicial misconduct (R. 281-282). Thus, we have a situation involving a hotly contested and highly controversial trial which resulted in an unfair trial, principally because of the conduct of the trial judge, and contributed to by misconduct of the prosecutor. The trial judge was personally involved and invaded the area reserved to counsel, thus creating the conflict which arose in the trial and out of which the abortive contempt citation grew (R. 266-267, 281-282). Notwithstanding that eight of the twelve grounds upon which the contempt citation rested were reversed, the court below ordered that petitioner be sentenced to jail for forty-eight hours even though, as the court below held, (R. 266) petitioner's "conduct cannot fairly be considered apart from that of the trial judge."

As we are of the view that this Court has held that contested criminal cases must be supervised and controlled only by a "neutral judge" (*Sacher* v. *United States*, 343 U. S. 1, 8) and where the right of counsel to vigorously defend his client is infringed by a judge, counsel will be protected (*Sacher* v. *United States*, supra, 9, 13) a Petition for Rehearing was filed below (R. 291-302). In that petition we pointed out that, while the proper respect is due the Bench, this Court's warning in the *Sacher* case that both judges and lawyers are human and both are heirs to

all the weaknesses of the human flesh should be borne in mind. We contended, because the conduct of counsel could not be separated from the misconduct of the judge and the prosecutor, that the ends of justice would be served if appellant's sentence was reduced to a fine or suspended in the event the court below did not feel as we did, that the sentence in toto should be voided. While the court modified its opinion, in accordance with the first prayer of our petition, it refused to further modify its judgment of November 19, 1953 and permitted a jail sentence against petitioner to stand, even though imposed summarily and without a hearing by a biased and prejudiced judge who invaded the area reserved to counsel, provoked counsel and by his conduct deprived petitioner's client of a fair and impartial trial.

As we read Rule 42 of the Federal Rules of Criminal Procedure, existing legislation and the applicable decisions of this Court, summary punishment cannot be imposed upon an attorney acting in the defense of a criminal case by a biased and prejudiced judge, who has invaded the area reserved to counsel and who became so personally involved in the trial that petitioner's conduct cannot be considered apart from that of the judge. In such a situation an attorney is entitled at the very least to a hearing by another judge. Rule 42(b), F.R.C.P., *Cooke* v. *United States*, 267 U. S. 517, 69 L. Ed. 767.

As this situation is important, not only to petitioner but to all trial attorneys, this Court should correct the manifest injustice involved in the ruling below, which jails an attorney for contempt, notwithstanding that it has been found by the Court of Appeals that the alleged contemptuous situation arose through improper actions of the trial judge and the prosecutor.

ARGUMENT

I.

In its decision the court below, after reversing the findings of the trial judge numbered 3, 4, 5, 7, 8, 9, 10 and 11, held (R. 266) that the record "does not support the penalty imposed" because the appellant's conduct "cannot be considered apart from that of the trial judge." The reasoning of the court below, among other things, was that petitioner suffered "great provocation" from the trial judge. Yet, instead of reversing the summary judgment of contempt imposed by the trial judge, the court below reduced the sentence of ten days to 48 hours. We submit that the summary judgment under the facts as now determined by the Court of Appeals should have been reversed in its entirety. The court below reviewed the actions of the trial judge and as we read that review (R. 266, 281-282) concluded that petitioner was subjected to "great provocation," "degrading and belittling remarks" and that the trial judge in doing what he did assumed "the function of an advocate" and displayed lack of impartiality, hostility and bias. The situation was further complicated to petitioner's prejudice because of the misconduct of the prosecutor (R. 281-282, 287-290). The court below pinpointed its condemnation of the trial judge by holding that his "treatment of appellant" (petitioner) was the "chief factor" in causing that court to reverse the *Peckham* trial and reduce petitioner's sentence. Where it has been determined on appeal that the trial judge was guilty of "provocation", "hostility", "bias" and "lack of impartiality" and sanctioned misconduct of the prosecutor and thereby deprived petitioner's client of a fair and impartial trial and *invaded the area reserved to counsel*, thus creating conflict, we submit that the principles announced by this Court in *Cooke* v. *United States*, 267 U. S. 517, 539, and *Tumey* v. *Ohio*, 273 U. S. 510, should be applied and the modified summary judgment of contempt entered below should be reversed in its entirety.

Our contention is supported by the Advisory Committee Notes pertaining to Rule 42(b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., page 495, Note 4, which state:

> that the provision in the sixth sentence disqualifying the judge affected by the contempt if the charge involves disrespect to or criticism of him is based, in part, on * * * and the observations of Chief Justice Taft in *Cooke* v. *United States*, 45 S. Ct. 390, 267 U. S. 517, 539; 69 L. Ed. 767.

As the Court of Appeals has found that the trial judge was provocative and biased the four remaining findings should not have been upheld on appeal.

Moreover, the decision below which now upholds a judgment entered by a trial judge found by the Court of Appeals to be biased and prejudiced, is contrary to an earlier decision of the same court. *Whitaker* v. *McLean*, 73 App. D. C. 259, 118 F. 2d 596.

The existence of the power to punish summarily for contempt does not mean that it is always appropriate to use it. *Cooke* v. *United States*, supra. This summary power should never be used where the trial judge is personally involved, shows hostility and bias and invades the area reserved to counsel in such fashion as to render the trial unfair. The employment of summary power to adjudge a lawyer in contempt seems inherently to involve the basic thought that the judge exercising such arbitrary power should be free from fault and should be precisely correct in his conduct. After all, the judge and the lawyer are both human and are both officers of the court. As this Court properly pointed out in *Sacher* v. *United States*, 343 U. S. 1, 8, there is strife in the trial of a contested criminal case, hence the supervision and control over counsel must be exercised only "by a neutral judge." In the *Sacher* case, this Court made it clear, where the "vigorous" "performance" of counsel brings him in conflict with the trial judge and where the area reserved to counsel is infringed by the trial judge,

that counsel will be protected in every duty of an advocate against the exercise of summary contempt power. Thus, this Court in the *Sacher* case held (p. 9):

> Of course, it is the right of counsel for every litigant to press his claim, even if it appears far-fetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts.

and (p. 13):

> But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.

It seems to us that the conflict below arose in part because of certain philosophies held by Judge Holtzoff on how courtroom procedures should be expedited. In a recent address delivered on April 6, 1953 before the Philadelphia Regional Chapter of the American Society for Public Administration, University of Pennsylvania (14 F. R. D., pp. 323-330), our judge opened his speech with a disparaging statement that "the legal profession is now conscious of its own frailties," and quoted the lines of Gilbert spoken by the Lord Chancellor in "Iolanthe" (p. 323):

> The Law is the true embodiment
> Of everything that's excellent.
> It has no kind of fault or flaw
> And I, my Lords, embody the Law.

Our judge then urged the streamlining of cases for trial, that jurors should be examined on the voir dire by the judge alone and stated that the judge himself could select a jury in a criminal case in an hour or less and in routine civil or criminal cases in less than ten minutes and rarely

more than twenty minutes. The judge stated his philosophy of expediting trials to be as follows (p. 326-327):

> Other means of expediting a trial involve the constant and continuous exercise of firm control by the judge. Too often, in State courts particularly, he is regarded as a mere moderator or chairman. This is not the wholesome common law concept. The judge should participate in the trial and regulate its course. He should not permit it to leave its proper channel. He has the right to exclude of his own motion all immaterial and irrelevant evidence and confine the trial to the issues to be determined.

Judge Holtzoff further stated (p. 327) "the court is clothed with power * * * to curb" counsel's interrogation of witnesses and contended that prolonged examinations caused departures, tangents and side issues which distract juries. We submit that the application of these principles to some extent caused the judge below to invade the area reserved for counsel as found by the court below (R. 282), and caused the conflict between the judge and the petitioner. Now that the court below has further found that the judge's treatment of petitioner showed bias, hostility and a lack of impartiality, the summary judgment imposed by him against petitioner should not be permitted to stand. We, of course, realize that the dignity of the Bench must be upheld, but as this Court warned in the *Sacher* case, judges too are heirs to all of the weaknesses of the human flesh and where a judge by his conduct provokes incidents, invades the lawyer's field and creates strife, it does not seem fair to us that, under such circumstances, an attorney endeavoring to carry out the duties of an advocate as best he can in order to afford the effective "Assistance of Counsel" guaranteed an accused by the Sixth Amendment to our Constitution, should be held in contempt if he fights back and attempts to meet such conduct on the battlefield of the judge's choosing, the open court. The ends of justice in such an instance would be best served by constructive and instructive language of an appellate court's

opinion rather than by the one-sided imposition of imprisonment upon defense counsel alone.

The decision below has erroneously decided questions of vital importance to courts and trial counsel alike contrary to *Cooke* v. *United States*, supra, *Tumey* v. *Ohio*, supra, and *Whitaker* v. *McLean*, supra, sanctions a departure from the accepted and usual course of judicial proceedings concerning contempt powers and should be reversed by this Court in the public interest and in the aid of the proper administration of criminal justice.

II.

It has long been a fundamental concept of American jurisprudence that the judge who presides over civil and criminal cases should be fair, unbiased and completely impartial. Any bias, hostility or prejudice, or even interest in the outcome of a given civil or criminal case will disqualify a judge from presiding over that case. *Tumey* v. *Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749.

In the *Tumey* case in ruling that the presiding judge in a judicial proceeding in our country under either the Fifth or Fourteenth Amendments must be impartial and in defining the term "due process of law" this Court said (p. 535) due process requires that the presiding judge be impartial and if that judge is not impartial he is disqualified to enter any judgment thereafter in the proceedings. Thus, this Court said in reversing a judgment imposed by an Ohio judge (p. 535):

> It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100, which was the minimum amount, and therefore that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. He seasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge * * *.

To affirm a judgment of conviction imposed by a judge whom the Court of Appeals found to be biased, prejudiced and not impartial is contrary to the national solicitude that our tribunals shall not only be impartial to controversies submitted to them, but shall give assurance that they are impartial and free from any bias or prejudice that might disturb the normal course of impartial judgment. *Berger* v. *United States*, 255 U. S. 22, 35, 36, 41 S. Ct. 230, 65 L. Ed. 481.

Where bias or prejudice is shown on the part of the presiding judge, it is the duty of that judge to proceed no further in the case and not to enter a final judgment. As our Court of Appeals has found the trial judge here was biased and prejudiced and lacked impartiality, it follows, even under Rule 42(a), that he could not proceed further. He certainly could not enter a summary judgment of contempt because being biased that judgment would not be impartial. The court below has applied the principles of the *Berger* case to bias arising during the course of a trial. *Whitaker* v. *McLean*, 73 App. D. C. 259, 118 F. 2d 596.

In the *Whitaker* case the court below reversed the action of the trial judge because it appeared in a colloquy with counsel during the trial, occurring in the absence of the jury, that the trial judge made certain remarks which caused plaintiff's counsel to express the opinion that he could not very well go on because the judge's remark evidenced bias and prejudice. Nevertheless, at the conclusion of this bench colloquy the trial proceeded. At the close of the testimony the trial judge directed a verdict for the defendant. In reversing this case, our Court of Appeals said (p. 596-597):

> The judge may, as indeed he insisted, have felt no hostility to the plaintiff, and in that view he was subjectively free from bias. But bias must be considered objectively. Few, if any, judges would make the reported remarks, in the course of a trial unless they had developed definite and positive hostility to the plaintiff and his case. Hostility is a form of bias.

> When a judge has shown bias before trial, Section 21 of the Judicial Code, 28 U. S. Code Annotated, Sec. 25 provides means of disqualifying him. The policy underlying Sec. 21 in the Courts of the United States 'shall not only be impartial in controversies submitted to them but shall give assurance that they are impartial;' i.e. shall appear to be impartial. *Berger* v. *United States*, 255 U. S. 22, 36; 41 S. Ct. 230, 235; * * *
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> * * * * *
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> A bias which develops during the trial and 'is grounded on the evidence' has been held not to be within the terms of Section 21. * * * Often some degree of bias develops inevitably during the trial. Judges can not be forbidden to feel sympathy or aversion for one party or the other. Mild expressions of feeling are as hard to avoid as the feeling itself. But a right to be tried by a judge who is reasonably free from bias is part of the fundamental right to a fair trial. If, before a case is over, a judge's bias appears to have become overpowering we think it disqualifies him.

The action of the court below in permitting a summary judgment of contempt to stand when that court has found that the trial judge who imposed the sentence was guilty of bias, hostility and a lack of impartiality, is contrary to the rulings of this Court in the *Tumey* and *Berger* cases and to the decision of the court below in the *Whitaker* case and is a denial of due process of law guaranteed to petitioner under the Fifth Amendment. Even if we assume the existence of the summary power to adjudge an attorney in contempt, under the circumstances which the Court of Appeals below has found to exist in affirming in part the summary contempt judgment here involved, we question whether it is appropriate to permit such a judgment to stand and these circumstances are sufficient to disqualify the trial judge from exercising the summary provisions of Rule 42(a).

Nor was it appropriate under our circumstances, even if the trial judge was qualified to act, which is denied, to ex-

ercise the summary power of contempt provided for in Rule 42(a). The summary judgment attempted to be imposed by the trial judge came at the conclusion of the charge to the jury (R. 256). The trial judge had full opportunity to afford petitioner a hearing within the usual conceptions of due process of law as required by the Fifth Amendment. This procedure would not have impeded or obstructed the trial of the *Peckham* case. While summary contempt proceedings are authorized by Rule 42(a), we submit that the theory behind them is to "enforce obedience and order in the court and not to impose unconditional criminal punishment." *Sacher* v. *United States*, 343 U. S. 1, 22 (Dis. Op. J. Black), 29 (Dis. Op. J. Frankfurter).

In *In re Oliver*, 333 U. S. 257, 92 L. Ed. 682, this Court squarely held (pp. 274, 275) that the only time when the exercise of the "extraordinary but narrowly limited power to punish for contempt" by way of a summary proceeding is authorized and the "due process" requirements can be ignored is where "charges of misconduct" occur "in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public."

When the need of preserving obedience has passed, there is no need to punish an alleged contempt in a summary manner and it should be dealt with as the law deals with other illegal and criminal acts (*Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 425-426) because summary power is "capable of grave abuses" and is limited in exercise to "the least possible power adequate to the end proposed." *In re Oliver*, supra, 274.

Article III, Section 2 of our Constitution requires that the trial of all crimes shall be by jury. Contempt proceedings are criminal prosecutions brought to punish public wrongs. While there are unusual instances in which

this Court has upheld summary proceedings in contempt cases, nevertheless this Court has made it clear that such a proceeding should be used only if necessary to preserve order in the court or to prevent interference with the court's processes or business. Recent decisions of this Court have expressed caution in the exercise of summary contempt power. *Michaelson* v. *United States*, 266 U. S. 42; *Nye* v. *United States*, 313 U. S. 33; *Cooke* v. *United States*, 267 U. S. 517.

If summary proceedings are to be indulged in at the whim of a judge, particularly if that judge by his conduct has shown bias and prejudice against an attorney, the judiciary will have power to sentence and confine citizens of the United States without even the semblance of a hearing or any of the steps which have been considered necessary in a criminal case. Moreover, to permit a biased judge to so act would be tyrannical, oppressive and wrong. *Hovey* v. *Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215.

The warnings which this Court announced in 1897 in the *Hovey* case are peculiarly applicable and timely today. In condemning the exercise of the contempt power by a court of the District of Columbia, this Court held (p. 413):

> The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

As this Court so pointedly said in the *Hovey* case, a sentence pronounced without an opportunity and without the right of defense generally is not entitled to the respect of any tribunal and to commit a person without a hearing, except under the extraordinary exceptions approved by this Court to protect the court itself, would be a most

flagrant violation of the rights of the citizen and could convert the judiciary into an engine of oppression capable of destroying great constitutional safeguards.

In the instant case no need was shown for the exercise of the summary power of contempt and its exercise was oppressive and the wrongful culmination of the invasion by the trial judge of that area reserved to counsel, who was duty bound to give fearless and effective "Assistance of Counsel" to his client as required by the Sixth Amendment. *Johnson* v. *Zerbst*, 304 U. S. 458, *Powell* v. *Alabama*, 287 U. S. 45.

III.

The trial judge in taking the action he did and in sentencing petitioner to jail denied the petitioner the right to notice, charges, a hearing, including the right to offer evidence in contradiction or mitigation of such charges and the right to counsel. The summary contempt power of its very nature is subject to being exercised arbitrarily and in a fashion which will deprive an accused of all of the safeguards of due process of law as guaranteed by the Fifth Amendment. This contempt power should be narrowly restricted and when used it should only be in cases of contempts occurring in the actual presence of the court which are willful and which if not immediately suppressed will disturb the court's business or interfere with the processes of the court. *Cooke* v. *United States*, supra.

When all of these elements are not present, the summary contempt power should not be used. The provisions of Rule 42(a) are permissive and do not require that all contempts occurring in the presence of the court be proceeded with summarily.

As the trial judge did not find in the four findings which were sustained on appeal, and as the appellate court likewise did not find in affirming these four findings that appellant's conduct obstructed the course of justice in some way and was done wilfully and with bad motives, the findings are void (*In re Watts and Sachs*, 190 U. S. 1, 32) and

ld not have been entered summarily. To
ive findings was both an inappropriate
mmary power of contempt and exceeded
cretion. In no event could a biased judge
mmary proceedings and enter judgment.
upra; *Whitaker* v. *McLean*, supra.

IV.

l in *Sacher* v. *United States*, 343 U. S. 1,
l protect defense counsel in a criminal
s vigorous and effective performance of
ning to the office of an advocate against
rcise of summary contempt power under
say this is an appropriate case for the
ower of protection. The specifications of
ed by the Court of Appeals were imposed
trial judge and now relate to discourteous
ng questions, asking prejudicial questions
witness in an abortion case and the seek-

Neither the trial judge nor the Court of
at there was a wrongful intent on the pe-
counsel for Dr. Peckham to violate court
what he considered to be his duty to pro-
the controversial trial below. Moreover,
s been held by the Court of Appeals to
trial, mainly because of the misconduct of
and his display of bias and prejudice di-
. Concerning the affirmed findings
specific intents must be proven and found
r before contempt charges can be upheld,
ntered, which is not the situation here.
ks, 190 U. S. 1, 32, 33.

record does not support finding 1 that
ourteous to the trial judge when we view
measure it against the prejudicial conduct
ge and the prosecuting attorney. The in-
the trial court complains were attempts

made on the part of petitioner to have the record reflect personal mannerisms and tones of voice of the trial judge which petitioner considered were prejudicial to his client and improper (R. 74-79, 81-82, 113-114, 146, 154-155, 157-158, 177-179, 195-196, 209-210, 221-222).

The court below has held in other cases involving the same trial judge that counsel have the right to have the record reflect the personal mannerisms and personal conduct of that judge, if counsel deem such conduct prejudicial, as the conduct would otherwise not appear of record *Butler* v. *United States*, 88 U. S. App. D. C. 140, 188 F. 2d 24; *Billeci* v. *United States*, 87 U. S. App. D. C. 274, 184 F. 2d 394; *Vinci* v. *United States*, 81 U. S. App. D. C. 386, 159 F. 2d 777.

In this respect the record will show that petitioner's objections were made in a respectful manner and that the trial judge, because of his sensitivity in his personal behavior, never denied the improper conduct charged to him by petitioner, but considered petitioner's efforts to have the record reflect that conduct as insolent and contemptuous. Petitioner's actions in noting his objections to the trial judge's conduct cannot be considered contempt, if the decisions of the court below in the *Butler*, *Billeci* and *Vinci* cases mean what they state.

The ruling of the trial judge (finding 2) which has been affirmed by the court below that the repeating of questions constitutes contempt is contrary to *Caldwell* v. *United States* (C.C.A. 9), 28 F. 2d 684; *Harris* v. *H. W. Gossard Co.*, 185 N. Y. Supp. 861, 194 App. Div. 688; and *Bennett* v. *Superior Court in and for San Diego County (Calif.)* 222 P. 2d 876.

The ruling of the trial judge (finding 6), which also has been affirmed by the court below, that questions of counsel directed to Mary Ott, the prosecuting witness, were contemptuous because those questions tended to besmirch her, is not supported by the record. Mary Ott was the complaining witness under both counts of the indictment which

charged two separate abortions. The evidence showed that she had lived in adultery with her paramour, had led an immoral life and had been involved in prior and earlier abortions. It was the ruling of the trial judge that these earlier events and her living with other men while she was married was not admissible and it was petitioner's effort to get these facts into the record that are now treated as contemptuous and besmirching the prosecuting witness. A part of the defense was that there was a strong hypothesis that one of the abortions charged in the indictment could have been committed by the prosecuting witness upon herself. Her denial that she committed the abortion should not have foreclosed counsel's cross-examination to bring before the jury these facts and the moral character of this woman. It must be remembered that the defendant, Dr. Peckham, denied committing the abortion charged. It was consistent with this defense that the witness herself was not only capable of committing the abortion but she had previous experiences with abortions. Moreover, the evidence was admissible on credibility. The court below has so ruled. *Thompson* v. *United States*, 30 App. D. C. 352, 12 Ann. Cas. 1064.

Meretricious relationships of witnesses may be shown in a criminal case as they affect morals, hence credibility, and show such witnesses in their true light. Questions to this end are proper and do not "besmirch" a witness, and this Court has so held. *Alford* v. *United States*, 282 U. S. 687, 692, 51 S. Ct. 218, 75 L. Ed. 736; *Tla Koo-gel-lee* v. *United States*, 167 U. S. 274, 17 S. Ct. 855, 42 L. Ed. 166. Even the trial judge here involved has so ruled in the prosecutor's favor. *United States* v. *Edmonds*, 63 F. Supp. 968, 973.

Petitioner as defense counsel for the accused was duty bound to raise the questions concerning the prosecutor's chief witness and to obtain a ruling of the trial court thereon in order to preserve his contentions for appeal. Counsel was doing no more than this in asking the ques-

tions which he did and as the trial judge and the court below have failed to find that the questions asked by petitioner were willful and intentional violations of existing court orders, this finding is abortive and void. *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

With respect to finding 12 of the trial judge that petitioner sought to provoke a mistrial, the Court of Appeals has now found that the trial below was a mistrial because of the improper conduct of the trial judge. In such a situation we do not see how, because counsel insisted throughout the trial that the judge's conduct had caused a mistrial, these actions can be treated as contempt. It seems anomalous to us when it is now admitted that appellant's motions to have a juror withdrawn and a mistrial declared were well taken, that he should now be held in contempt because he pressed this valid contention during the trial.

Finally, insofar as the four findings are concerned which the Court of Appeals has permitted to stand, as motives, intents and purposes are necessarily involved in each of these findings, petitioner should have been afforded the opportunity to testify and defend his motives, intents and purpose both by way of defense and by way of mitigation. *Cooke* v. *United States*, supra; *Bowles* v. *United States*, 50 F. 2d 848, 850.

As no hearing was afforded and no evidence was taken concerning appellant's motives, intents and purposes, the judgment below is abortive and invalid as modified because based upon an incomplete and improper record. *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292.

And even if the remaining findings had found deliberate intent and willful misconduct, which they do not, the record would not support any such findings. The trial judge below on numerous occasions has specifically found throughout the trial that the conduct which resulted in his certificate was not done in bad faith and was not done intentionally by petitioner. Thus, at R. 69 petitioner stated to the judge when he was accused of being belligerent and

insolent that he did not mean to be so, whereupon the judge replied, "I am sure you didn't, but still let it not be done." This is an important ruling because the judge was dealing with many "breaches of my rule" by petitioner (R. 68). At R. 70, when the judge objected to the mannerisms of petitioner and insisted that he must be calm and courteous, petitioner replied, "I mean to be courteous at all times, your Honor," whereupon the judge replied, "No you haven't, you may not be conscious of it." Again at R. 73 when the judge below discussed the tone of petitioner's voice "on several occasions" as being "somewhat belligerent" the judge stated, "And I would say you probably didn't intend it as such." And, at R. 89, after petitioner objected to the witness Ott's signaling answers to her mother (R. 88), the judge below suggested that petitioner was acting in an "excitable and in a boisterous manner," whereupon petitioner stated, "I did not mean to be boisterous." The judge said, "I assume that you didn't mean that * * *." Later in the trial (R. 153) when petitioner was endeavoring to establish through cross-examination of Christianson, a felon, the paramour of Mrs. Ott and the cause of her pregnancy, that he participated in the crime of abortion and was an accomplice, the judge suggested to petitioner that he should treat such a witness with a "little more courtesy." Petitioner thereupon assured the judge that he was being firm with the witness but he was entitled to get answers to his questions, that he was not discourteous and that he was speaking in a courteous tone, whereupon the judge said (R. 153) "You have a right to be firm." Thus, we submit that the trial judge has specifically found and ruled throughout the trial that appellant in doing what he did, did not mean to be contemptuous, did not mean to be boisterous, intended no discourtesy and had a right to be firm. How in such circumstances appellant can now be adjudged in contempt for these very situations is difficult for us to understand and is contrary to the *Watts and Sachs* case.

Another aspect of this case gives us grave concern. Inherent in the arbitrary and summary judgment of contempt here imposed is the threat of further punishment by way of disbarment or suspension. If the modified judgment is permitted to stand, it threatens and strikes at the very heart of the right of an accused to the effective "Assistance of Counsel". Not only does this dangerous threat exist but the trial judge as shown by the record (R. 257) referred all twelve of his findings to the District Court to be used as a basis for the disbarment or suspension of appellant and proceedings looking to this end are now pending in that court. This well illustrates our point that the arbitrary exercise of the contempt power can effectively destroy the office of advocate and deprive the citizen of that fair and impartial trial guaranteed by the Fifth and Fourteenth Amendments.

CONCLUSION

A reversal of the ruling below by this Court is essential in the interest of trial judges and trial lawyers. The proper administration of criminal justice requires this. We say if the present modified ruling is permitted to stand and is not reversed that a serious blow will have been struck at the right of an accused in a criminal case to have courageous and effective Assistance of Counsel, as guaranteed by the Sixth Amendment. Moreover, if a summary judgment imposed by a biased judge is permitted to stand against an attorney, a fundamental right, that is, the right to a fair and impartial trial, presided over by a judge free from bias as guaranteed by the Fifth and Fourteenth Amendments, will have been destroyed. The preservation of the independence of the bar is vital to the due administration of justice and its members should not be subjected to summary contempt judgments, for errors in judgment, when they act in good faith and in the honest belief that their actions are well founded and taken in the interests of their clients. Obviously, an attorney who would refrain

from defending the rights of his client because of fear or threats from a trial judge, would be considered quite unworthy of his high commission as a member of the bar and recreant of its honorable tradition of resisting every exercise of tyranny or arbitrary power. *In Re Cottingham, et al.* (Colo.), 182 P. 2, 66 Colo. 335.

WHEREFORE, we respectfully submit that the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed, the four remaining findings nulled and petitioner should be discharged.

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